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No. 87-1252

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

H.J. INC., A Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISSAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

STEPHEN A. BOKAT
ROBIN S. CONRAD
LYNN M. SMELKINSON *
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae The Chamber of Commerce of the United States of America

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

STATEMENT OF INTEREST[1]

Abusive use of the Racketeering Influenced and Corrupt Organizations Act (hereinafter referred to as

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36.2. The parties' consent letters have been filed with the Clerk of this Court.

"RICO") against legitimate businesses is pervasive and well recognized.[2] RICO's provision for treble damages and attorney's fees awards in civil cases was enacted as an aggressive initiative to inhibit organized criminal activity and to protect legitimate businesses from victimization by organized crime.[3] Instead, RICO's civil remedies have incited a multitude of litigation against legitimate, respected businesses for alleged wrongful conduct which bears little resemblance to organized criminal activities or the other evils Congress sought to expurgate.[4] The "extraordinary"[5] uses to which RICO has been put stem in great part from the sweeping scope of its provisions, and specifically, from an overly expansive interpretation by many courts of what constitutes a "pattern of racketeering activity" under RICO, and what, therefore is within RICO's ambit.[6]

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[2] *E.g.*, Lacovara & Arnow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Civil RICO*, 21 New Eng. L. Rev. 1 (1985-86).

[3] Organized Crime Control Act of 1969, Senate Rep. No. 617, 91st Cong., 1st Sess. 76 (1969) (hereinafter referred to as "S. Rep.") as cited in *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 517 (1985) (Marshall, J., dissenting).

[4] *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 499 ("It is true that private and civil actions are being brought almost solely against [legitimate businesses], rather than against the archetypal, intimidating mobster."); *see also id.* at 506 (Marshall, J., dissenting) ("Only 9% of all civil RICO cases have involved allegations of criminal activity normally associated with professional criminals. [Cite omitted]. The central purpose that Congress sought to promote through civil RICO is now a mere footnote.").

[5] *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 500.

[6] RICO provides, *inter alia*:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or in the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962.

The question of the appropriate standard to use in determining what conduct constitutes a pattern of racketeering activity is now before this Court. A standard which is not sufficiently tailored to the intent of Congress will, at the least, perpetuate RICO abuses. Businesses, their reputation threatened with the stigmatizing label of being "racketeers," and their pockets threatened with the possibility of extended litigation and treble damages, will increasingly settle even unfounded disputes, as well as disputes involving conduct far less odious than racketeer-

ing activity.[7] The effect has been, and will be, to injure those lawful businesses which RICO sought to protect.

As the largest federation of American businesses, the U.S. Chamber of Commerce (hereinafter referred to as the "Chamber") is greatly concerned with the indiscriminate expansion of civil RICO litigation and has testified before Congress regarding this issue.[8] The Chamber represents more than 180,000 corporations and partnerships, as well as several thousand trade associations and state and local chambers of commerce. Many of the Chamber's members who are well respected in the business community have been faced with civil RICO claims.[9] Neither the Chamber nor its members condone any kind of unlawful or unethical conduct, regardless of the legitimacy of the business itself. However, the Chamber and its members believe that legitimate enterprises should not be subject to RICO liability for behavior which does not amount to the type of activity Congress intended to

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[7] *See Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 506 (Marshall, J., dissenting) ("Many a prudent [RICO] defendant, facing ruinous exposure, will decide to settle even a case with no merit.").

[8] *Statement of the Chamber of Commerce of the United States on Racketeering Influenced and Corrupt Organizations Act*, Before the Criminal Justice Subcommittee of the House Judiciary, Oct. 9, 1985.

[9] Many of the following businesses which have faced RICO claims are members of the Chamber:

Bear Sterns & Co., Dean Witter Reynolds, Merrill Lynch, Pierce Fenner & Smith Inc., Morgan Stanley & Co., Inc., Oppenheimer & Co., American Express, Inc., Thompson McKennon Securities, Inc., Arthur Anderson & Co., Coopers & Lybrand, Ernst & Whinney, Laventhol & Horwath, Peat, Marwick Main Co., Price Waterhouse, Touche Ross & Co., Citibank, N.A., Wells Fargo, First American Bankshares, Inc., First Interstate Bank of Oregon, First National Bank of Maryland, Allstate Insurance Co., Prudential Insurance Co. of America, Travelers Insurance Co., USLIFE Corp., Boeing Co., General Dynamics Corp., General Motors Corp., Mitsui & Co., Inc., Rockwell International Corp., and Rohn & Haas Co.

reach, and which is adequately addressed by other existing laws.[10]

STATEMENT OF THE CASE

This case arises out of a class action under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, against Northwestern Bell Telephone Co. (hereinafter referred to as "Northwestern Bell"). It was alleged that Northwestern Bell committed various acts, including bribery, to illegally influence the Minnesota Public Utilities Commission (hereinafter referred to as "MPUC") in its determination of several rate cases. The MPUC is the regulatory body responsible for determining the rates Northwestern Bell may charge.

The District Court found that the First Amended Complaint failed to adequately allege a pattern of racketeering within the meaning of RICO, and dismissed the RICO counts of the Complaint. The District found that only one criminal scheme had been alleged. On Motion for Reconsideration, the Court affirmed.

The United States Court of Appeals for the Eighth Circuit, *en banc*, affirmed the lower court's ruling and denied rehearing. The Eighth Circuit held that an allegation of a single scheme to illegally influence the MPUC did not meet the two-pronged requirement necessary to establish a pattern of racketeering activity under RICO, based on this Court's opinion in *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. at 496 n.14.

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[10] There already exists adequate state and federal criminal laws to deal with malfeasance engaged in by business and civil remedies to provide relief to those injured. RICO is an exceptional statute that should be limited as intended by Congress.

SUMMARY OF ARGUMENT

To combat the infiltration of organized crime into American business, Congress enacted RICO. RICO provides, *inter alia*, an exceptional civil remedy of treble damages and attorneys fees to any person injured by an enterprise engaged in a "pattern of racketeering activity." After RICO's enactment, business became faced with enormous liability for alleged wrongful conduct which bore little resemblance to the organized criminal activity which Congress was attempting to address. In fact, that conduct is already adequately addressed by other federal and state statutes.

In *Sedima*, this Court noted that one way civil RICO liability could be properly limited was by courts appropriately defining what was meant by RICO's reference to a "pattern of racketeering activity." However, in the years since *Sedima*, the lower courts have failed to develop a unified, coherent definition of "pattern." Instead, three very different judicial standards have emerged. One is loose, and allows two acts to demonstrate a "pattern." Another standard is strict, and requires more than one scheme before finding a "pattern." The third standard attempts to balance all the facts of each case to determine if they indicate the type of situation Congress sought to address in requiring a "pattern."

This case presents an ideal opportunity for this Court to resolve the conflicting standards for determining what conduct constitutes a "pattern of racketeering activity," and therefore, what conduct is appropriately within the ambit of civil RICO. The Chamber proposes a standard which combines the strict view with the balanced view. Such a standard fulfills the purposes underlying RICO, yet also limits inappropriate and abusive applications of RICO. In proposing this standard, the Chamber takes no position as to the culpability of the Respondents in this case.

ARGUMENT

I. A UNIFORM STANDARD TO DETERMINE WHAT CONDUCT CONSTITUTES A "PATTERN OF RACKETEERING ACTIVITY" IS NEEDED TO CURTAIL THE INAPPROPRIATE USES OF RICO

To forestall a rampant infusion of organized crime into commerce, and its resulting injurious effect upon American business, Congress enacted RICO. S. Rep., *supra* note 3. RICO provided, *inter alia*, new civil remedies in a potent initiative to curtail organized criminal activity and to protect legitimate business from victimization through infiltration, unfair competition, and massive fraud. *Id.* The RICO civil remedy provides for the award of treble damages and attorney's fees to any person injured in his business or property by an enterprise engaged in a "pattern of racketeering activity." 18 U.S.C. § 1964(c).

As recognized by this Court, RICO has evolved since its enactment in 1970 into "something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 500.[11] In fact, a survey conducted by the American Bar American Ad Hoc Civil RICO Task Force in 1985 found that only nine percent of allegations under civil RICO involved offenses which are associated with professional criminal activity.[12] The great majority of

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[11] The Fifth Circuit has aptly described the resulting situation: The scope of the civil RICO statute is breathtaking. An allegation of fraud in a contract action can transform an ordinary state law claim into a federal racketeering charge. *R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985).

[12] The ABA Report found that of 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common-law fraud in a commercial business setting, and only 9% allegation of criminal activity of a type generally associated with professional criminals. ABA Section of Corporation, Banking & Business Law, Report of the Ad Hoc Civil RICO Tack Force, 55-57 (1985) (hereinafter referred to as "ABA Report"). One commentator has noted

civil RICO actions are brought against legitimate businesses in ordinary commercial settings.[13] This expatiation of RICO's intended use has resulted in adversely impacting the very interest RICO was designed to protect. Several members of this Court have noted that the extraordinary uses to which civil RICO has been put have taken their toll on commerce. In *Sedima*, Justice Marshall joined by Justices Brennan, Blackmun and Powell, stated that

> [the] results [of such extraordinary uses] distort the market by saddling legitimate business with uncalled-for punitive bills and undeserved [perjorative] labels. To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that the statute sought to protect.

Sedima, 473 U.S. at 520 (Marshall, J., dissenting). Unlike criminal RICO actions which are subject to the judicious discretion of government prosecutors, the filing of civil RICO actions are free from any restraints and are left to the unfettered discretion of private litigants. The incentive of treble damage awards plus attorney's fees are strong inducements for claimants to file unmeritorious claims against businesses who will settle a suit rather than face the bad publicity attendant to charges of racketeering or expend the time and cost of litigation. As Justice Marshall has noted "[m]any a prudent [RICO] defendant, facing ruinous exposure, will decide to settle even a case with no merit." *Sedima*, 473

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that "[l]awyers say the number of court awards under RICO is not an accurate measure of the problem, because few cases go to trial: The mere threat of a headline suggesting a connection with organized crime often induces a settlement." *Business is Picking Up An AntiCrime Weapon*, Business Week, Feb. 20, 1984, at 85.

[13] *See id.*

U.S. at 506 (Marshall, J., dissenting). "It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Id.*

II. EXISTING STANDARDS FOR DETERMINING A "PATTERN OF RACKETEERING ACTIVITY" DO NOT SUFFICIENTLY ADDRESS THE ABUSE OF CIVIL RICO

As this Court has noted, the inappropriate expansive use of civil RICO[14] could be curtailed by the enunciation of a proper standard for courts to follow in determining what constitutes a "pattern of racketeering activity" under RICO.[15] The creation of such a standard would be an appropriate action of the Court as Congress itself believed that "[t]he concept of 'pattern [was] essential to the operations of the [RICO] statute." S. Rep. 158 as cited in ABA Report, *supra* note 12, at 104. Moreover, the pattern requirement was intended by Congress to keep the impact of RICO liability within the bounds set by Congress, as a counter balance to RICO's liberal interpretation clause. ABA Report, *supra* note 12, at 104.

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[14] "The 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail and securities fraud, and the failure of Congress and courts to develop a meaningful concept of 'pattern.'" *Sedima*, 473 U.S. at 500; *see also id.* at 506 (Marshall, J., dissenting).

[15] Another means by which RICO abuse may be limited is by the vigorous application of Federal Rules of Civil Procedure 9(b) (allegations of fraud must be stated with particularity) and 11 (Counsel of Record must certify that the complaint is well-grounded in fact and is not interposed for any improper purpose, such as to harass). *Goldsmith* v. *Keith, Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U.L. Rev. 55, 86-87, 96-97 n.178 (1986). An example is *Northern Trust Bank/O'Hare N.A.* v. *Inryco, Inc.*, 615 F. Supp. 828 (N.D. Ill., E.D. 1985). In that case a trustee filed suit alleging that a contractor and others violated RICO when they participated in

In *Sedima*, this Court discussed the general parameters of the pattern requirement and found that two issues must be addressed: relationship and continuity.[16] This Court based its analysis on (1) the Congressional intent underlying the pattern requirement and (2) the common meaning of pattern. See *id.* Since *Sedima*, however, the lower federal courts have been unable to agree on the proper scope and impact of *Sedima*'s two-pronged analysis, and have generally ended up extending, rather than restricting, RICO's reach. *Sun Sav. & Loan Ass'n* v. *Dierfdorff*, 825 F.2d 187, 197 (9th Cir. 1987). The discussion regarding the pattern requirement has moved away from *Sedima*'s analysis and instead focused on the semantic distinctions among act, activity, episode, scheme, and effort. *See* Note, *Civil RICO—The Pattern of Racketeering Requirement: Louisiana Power and Light v. United Gas Pipeline*, 8 Energy L.J. 105, 108 n.35 (1987).[17] Among the federal courts, three major standards for determining what conduct constitutes a pattern of racketeering activity have emerged—referred to herein as the "liberal" standard, the "conservative" standard,

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a construction contract scheme. The contractor moved to dismiss under, *inter alia*, Rule 9(b). Although the Court did not reach the issue of Rule 9(b) as it dismissed the complaint on other grounds, it stated that the "[t]rustee and its counsel will be well advised to bear in mind their obligations under Rule 11 before they opt to include [the contractor] in an amended RICO complaint." *Id.* at 835.

[16] *Sedima*, 473 U.S. at 496 n.14 (quoting S. Rep. 158) ("It is this factor of *continuity plus relationship* which combines to produce a pattern.").

[17] *See, e.g., Northern Trust Bank/O'Hare, N.A.* v. *Inryco, Inc.*, 615 F. Supp. at 831 ("[The word pattern] connotes a multiplicity of events: Surely the continuity in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the same criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'") (emphasis added); *cf. Sun Sav. & Loan Ass'n* v. *Dierfdorff*, 825 F.2d at 193 ("RICO requires repeated *acts*, not repeated *activity*.").

and the "judicious" standard. *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, 642 F. Supp. 781, 808 (E.D. La. 1986).

A. The Liberal Standard

The "liberal" standard does not truly adopt *Sedima*'s two-pronged analysis as a requirement for finding a RICO violation. It allows any two related acts of racketeering activity to establish a pattern of such activity. *See R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350 (5th Cir. 1985). Continuity is discussed only in terms which negate its effect. *E.g., Sun Sav. & Loan Ass'n* v. *Dierfdorff*, 825 F.2d at 194 n.5 (cited at Petitioners' Brief 34).[18] As its rationale, this approach relies heavily on the RICO definition of "pattern of racketeering activity." *See* Note, *Civil RICO—The Pattern of Racketeering Requirement: Louisiana Power and Light v. United Gas Pipeline, supra* p. 10, at 114-15. That definition provides only that a " 'pattern of racketeering activity' requires at least two acts of racketeering activity . . . [occurring] within ten years." 18 U.S.C. 1961(5).[19]

The "liberal" standard fails to put that "pattern" definition in the proper context—the purpose underlying the pattern requirement. Congress intended the pattern requirement to limit the scope of RICO to apply to defendants who regularly commit racketeering acts. ABA Report, *supra* note 12, at 104, 203-08. "There must

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[18] Note, *The Pattern Requirement of Civil RICO*, 74 Ky. L.J. 623, 636, 642-43 (1985-86); Note, *Civil RICO-The Pattern of Racketeering Requirement: Louisiana Power and Light v. United Gas Pipeline, supra* p. 10 at 110-11; *see also* cases discussed in Ross, *The Pattern Element of RICO Before and After Sedima: A Look at Both Federal and Florida RICO*, 15 Fla. St. U.L. Rev. 321, 332-33, 342-43 (1987).

[19] "Racketeering activity" means, generally, murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotics or other dangerous drugs, counterfeiting, embezzlement, mail fraud, wire fraud, and securities fraud. 18 U.S.C. § 1961(1).

be some indication of a 'threat of continuing activity' by a defendant." S. Rep. 158, as cited in ABA Report, *supra* note 12, at 104-05. Related acts of racketeering which do not indicate that the actor has a propensity for continuing such actions do not satisfy the second prong of *Sedima* and therefore, do not meet the definition of "pattern of racketeering activity" in the context of RICO. Not surprisingly, the application of the "liberal" standard has had inappropriate results.[20]

B. The Conservative Standard

The "conservative" standard, applied by the court below, requires that the defendant's conduct involve two or more efforts or schemes to be subject to RICO. "At a minimum, this standard requires that the [RICO] defendant must harm the plaintiff more than once—it must have committed acts which are ongoing, and which have an independent and repeated harmful significance for the plaintiff." *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, 642 F. Supp. at 809. This standard adopts *Sedima*'s two-pronged analysis and in the vast majority of cases satisfies it. However, the requirement of two separate schemes may fail *Sedima*'s two-pronged analysis if the schemes themselves are not sufficiently connected to show either relationship or continuity.

Further, the line separating one scheme from another may at times be difficult to draw. For example, can one of the schemes consist of only one act? In such a situation, courts would find the definitional problem merely shifted from the concept of pattern to that of scheme. The "conservative" standard has been criticized several times. *See* cases cited in Petitioners' Brief 13-17; *see also*

[20] *E.g.*, In *R.A.G.S. Couture, Inc.* v. *Hyatt*, a clothing manufacturer successfully filed a civil RICO action against two employees for mailing two fraudulent invoices within five months of each other. 774 F.2d 1350. The acts of mailing two fraudulent invoices without more is not the type of activity Congress intended to reach with its exceptional RICO remedy.

International Data Bank v. *Zephin*, 812 F.2d 149, 154-55 (4th Cir. 1897); Ross, *supra* note 18 at 339, 349. Even a court which had adopted the conservative standard has questioned its utility if applied to every circumstance. *Condict* v. *Condict*, 826 F.2d 923, 928-29 (10th Cir. 1987).

C. The Judicious Standard

The third major standard adopted by the courts, the "judicious" standard, does not completely reject the "conservative" standard but instead uses it merely as an aid to analysis. *See International Data Bank* v. *Zephin*, 812 F.2d at 155. The "judicious" standard, examines various factors to determine if the acts alleged are the type which RICO was intended to cover. Such factors include (1) when the acts occurred, (2) what they were, (3) who was harmed, (4) who acted, (5) whether the scheme or schemes have been completed, (6) whether the act(s) or scheme(s) can be repeated, and (7) the likelihood of such repetition. *See* Note, *The Pattern Requirement of Civil RICO*, *supra* note 18, at 632. By examining these factors, the "judicious" standard can be flexible enough to apply to all of RICO's situations. However, it may go too far. The "judicious" standard is necessarily an inexact standard.[21] As the only guide to all interpretations of RICO's pattern requirement, it could be applied in so many ways among the lower courts that, once again, there would be no standard at all, and the same abuses as currently occur would not be prevented.

III. THE CHAMBER'S PROPOSED STANDARD FULFILLS THE PURPOSES UNDERLYING RICO AND LIMITS ITS ABUSES

The most appropriate standard, as proposed by the Chamber, is a hybrid of the "conservative" and "judicious" standards. Such a hybrid would both fulfill the

[21] *Morgan* v. *Bank of Waukegan*, 804 F.2d 970, 977 (7th Cir. 1986) ("[T]his factually-oriented standard . . . is necessarily less than precise. One judge has even analogized this legal test to Justice Stewart's famous test for obscenity—'I know it when I see it.'").

purposes underlying RICO, yet also limit its damaging effect. In resolving the above noted conflicting interpretations of *Sedima* and RICO's pattern requirement, any standard finally adopted must accomplish two things. First, it should fulfill the purposes underlying RICO by being flexible enough to apply to all of RICO's situations. Second, a standard should limit the scope of civil RICO to curtail those abuses that harm the interest of legitimate business which Congress sought to protect. In addressing these two goals, a standard should also be based upon the fact that the concept of pattern was essential to the operation of RICO,[22] and the plain meaning of the word pattern.[23]

The proper starting point in the development of such an appropriate standard is this Court's discussion of "pattern" in *Sedima*. This Court's two-pronged analysis of relationship and continuity provides a framework within which the intent of Congress can be met without overstepping the bounds of that intent or the statute as written. In developing an appropriate standard, care must be taken that the two prongs of the *Sedima* analysis are not forced into internal inconsistency. A finding of relationship must not itself preclude a finding of continuity, and vice versa. *Morgan* v. *Bank of Waukegan*, 804 F.2d at 977.[24] As stated earlier, this Court based

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[22] *See* Organized Crime Control Act of 1969, Senate Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) as cited in ABA Report, *supra* note 12, at 104) ("The concept of 'pattern' is essential to the operation of the statute.").

[23] *See Sedima*, 473 U.S. at 496 n.14, Note, *Reconsideration of Pattern in Civil RICO Offenses*, 6 Notre Dame L. Rev. 83, 89 n.50 (1986); Ross, *supra* note 18, at 334.

[24] "Requiring both continuity and relationship among the predicate acts for the pattern requirement to be met is a sound theoretical concept that is not easily accomplished in practice. This is because the term 'continuity' and 'relationship' are somewhat at odds with one another. Relationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct. Continuity, on the other hand, would embrace predicate acts occurring at different points in time or involving different victims. To focus excessively on either continuity or relationship alone effectively negates the remaining prong." *See also*, Ross, *supra* note 18, at 339, 341, 343.

its analysis in part on the common meaning of pattern. In examining the common parlance meaning of pattern to determine relationship, it is clear that individual elements of a pattern must be related by some theme. Such a theme may be demonstrated by a relationship between or among the elements themselves, or by their individual relationships to a separate principal.[25] For example, completely isolated acts of fraud, extortion, and arson, committed by different individuals, should be found to be related where the perpetrators have a relationship to each other in a mutual aim of unlawful profit.[26] Just as well, if the acts are all in furtherance of one common scheme or objective, they are also clearly related.[27]

Although the concept of "pattern," in common usage, need not suggest continuity in time, it is clear that Congress intended to include temporal continuity as part of the RICO pattern requirement. *Sedima*, 473 U.S. at 496

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[25] *See* Ross, *supra* note 18, at 348-49; Goldsmith & Keith, *supra* note 15, at 101 n.184.

[26] *E.g., United States* v. *Elliot*, 571 F.2d 880, 884 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978) ("Simply stated, this is a case involving a group of persons informally associated with the [sole] purpose of profitting from criminal activity."); *see also* cases cited at Note, *The Pattern Requirement of Civil RICO*, *supra* note 18, at 634 n.69; Ross, *supra* note 18, at 328 n.20 and accompanying text.

[27] *See United States* v. *Starnes*, 644 F.2d 673, 678 (7th Cir. 1981) (acts included traveling interstate to commit arson, setting a fire to defraud an insurer, and using the mails to complete the fraudulent scheme) (cited, *inter alia*, at Note, *The Pattern Requirement of Civil RICO*, *supra* note 18, at 634 n.70); Note, *Reconsideration of Pattern in Civil RICO Offenses*, *supra* note 23, at 87.

n.14.[28] Continuity implies a likelihood to engage in further racketeering activity, but not necessarily of the same kind as already engaged.[29] To determine such a likelihood, the acts allegedly already engaged in must be closely examined. Even two schemes do not unavoidably imply continuity.[30] Neither does one scheme necessarily fail to imply continuity.[31] Such an examination should apply the methodology of the "judicious" approach and look to elements of the alleged acts such as (1) when they occurred, (2) what they were, (3) who was harmed, (4) who acted, (5) whether the scheme or schemes have been completed, (6) whether the act(s) or scheme(s) can be repeated, and (7) the likelihood of such repetition.[32]

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[28] *See* Note, *Reconsideration of Pattern in Civil RICO Offenses*, *supra* note 23, at 86 n.20; *see also* Ross, *supra* note 18, at 334; Note, *The Pattern Requirement of Civil RICO*, *supra* note 18, at 637.

[29] *See* Note, *Reconsideration of Pattern in Civil RICO Offenses*, *supra* note 23, at 95.

[30] For instance, a bank employee's scheme to embezzle, along with a completely separate scheme to commit insurance fraud by arson, both completed in the same short period of time, may provide enough monetary gain to allow the perpetrator to flee the country and retire to a life of quiet indolence. However, it could not be said that the employee had committed a pattern of racketeering activity because there is no perceptible threat of continuity.

[31] For example, *United States* v. *Wachmaker* involved a group, the Outlaw Motorcycle Club, associated for the purpose of engaging in drug trafficking and prostitution. 761 F.2d 1459 (11th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986). A member of the group was indicted for shooting three police officers. The court found that shooting acts occurred in a single criminal episode but nonetheless held that the continuity element was satisfied. *Id.* at 1475. It reasoned that the purpose and nature of the enterprise satisfied the requirement of a threat of continuity because the motorcycle club gang would continue to carry out illicit activities. *Id.*

[32] *See, e.g.*, Note, *The Pattern Requirement of Civil RICO*, *supra* note 18, at 632.

Petitioners argue (Brief 34) that "continuity must be looked at in terms of the ongoingness of the activity when it is occurring rather than at its end when the activity has been discovered. [Citations omitted.]" Such an approach would render the continuity prong of *Sedima*'s analysis a hollow and specious formality. Of any two related acts it can be said that there will be "a threat of continuing activity" as of the first act. *See Sun Sav. & Loan Ass'n* v. *Dierfdorff*, 825 F.2d at 194 n.5 (cited at Petitioners' Brief 34).[33] Petitioners' argument is, therefore, essentially only a moderately restated version of the inappropriately loose "liberal" standard, and must be rejected. See above discussion regarding the "liberal" standard. Even if all predicate schemes have been completed, RICO's legislative history requires that a plaintiff allege some threat of continuing activity. *See* Note, *Civil RICO—the Pattern of Racketeering Requirement: Louisiana Power and Light v. United Gas Pipeline*, *supra* p. 10, at 110-11. For example, if all the alleged predicate acts were only part of a scheme to gain control of an enterprise that by the time of the suit was already under control, continuity could be satisfied by an allegation that the now-controlled enterprise would begin to conduct its affairs by means of racketeering activity.

The Chamber asserts that, in situations where the conservative approach yields questionable results, courts should then apply the "judicious" approach. For instance, in a situation where there is only one scheme and a separate act, or where the two schemes themselves may not truly indicate continuity, the "judicious" analysis of the alleged facts can resolve the remaining doubts. The approach urged by the Chamber both adequately serves

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[33] "The fact that the last of a series of predicate acts may have completed the criminal scheme does not necessarily preclude a finding of continuity. As long as a threat of continuity exists at some point during the racketeering activity, the continuity requirement is satisfied."

the ends of the RICO legislation, and yet protects those legitimate operations meant to be the beneficiaries of RICO's civil liability mechanism.

IV. THE STANDARD ADVOCATED BY THE CHAMBER HAS BEEN APPLIED AND WORKS

Exactly such an approach as recommended herein by the Chamber was adopted in *Temporaries, Inc.* v. *Maryland Nat'l Bank*, 638 F. Supp. 118 (D. Md. 1986) (hereinafter referred to as "*Temporaries*"), to reject a claimed pattern of racketeering activity. The *Temporaries* case arose out of a situation where ten to fifteen communications were alleged to have been made over two months in furtherance of a plan to induce the plaintiff to invest funds in a failing business. *Id.* at 121. The defendant bank asserted that such conduct if true did not constitute a pattern, in that only one scheme was alleged. The court cogently analyzed the RICO pattern requirement in light of this Court's *Sedima* decision.

First, the *Temporaries* court noted that "[t]wo actions . . . standing alone may be insufficient to constitute a pattern under RICO." *Id.* at 122. The court then applied *Sedima*'s two pronged analysis, finding the alleged facts met the various possible definitions of relationship. *Id.* In the course of examining the continuity prong of *Sedima*'s analysis, the court discussed and criticized the "conservative" standard as unnecessarily restrictive. *Id.* at 123. Nonetheless, the court indicated that an analysis could start with counting the number of schemes. *Id.* at 123-24.

The *Temporaries* court noted that, while two or more schemes may yield a pattern, one scheme alone may do so as well. *Id.* at 123. The court also noted that the concept of scheme presented its own definitional requirements. *Id.* Further, the Court provided a list of factors which could help determine continuity. *Id.* at 123 n.1A. The court concluded that its flexible approach would not

only be most compatible with Congressional intent and the common sense, lay usage of pattern, but would also reconcile the standards herein termed "liberal," "conservative" and "judicious." *Id.* at 123-24.

> Such an interpretation would prevent the propelling of isolated schemes of garden variety fraud into the domain of RICO simply because several interstate phone calls were conducted. But it will leave intact the broad remedial purposes of RICO in cases in which Congress intended to provide an extraordinary remedy—those which evidence a true pattern of racketeering activity. *Id.* at 124.

The *Temporaries* court found that the facts therein alleged showed only one scheme which did not have the necessary level of continuity to satisfy RICO's pattern requirement. *Id.* at 124-25. The *Temporaries* opinion demonstrates an appropriate weighing of the relevant facts as presented. This is a reasoned manageable approach which, as in *Temporaries*, rejects unfounded or overbroad RICO claims without doing damage to RICO itself.

CONCLUSION

Having outlined the scope of an appropriate methodology for determining whether a "pattern of racketeering activity" exists for purposes of civil RICO liability, the Chamber takes no position as to the outcome of applying that method in the instant case. The Chamber urges that the Court weigh the relevant factors, and measure the alleged activities of Respondents against the activity Congress was attempting to address in adopting the civil RICO penalty. The Chamber also urges this Court to consider whether allowing Petitioners to continue their action pressing civil RICO liability in this situation would remedy the harm Congress was addressing, or would instead only harm one of the entities Congress had meant to protect.

For all of the foregoing reasons, the Chamber respectfully requests the Court to adopt the standard proposed above as the standard for determining whether a "pattern of racketeering activity" has been properly alleged in any civil RICO case. The Chamber's standard tempers the strict, "conservative" standard of the court below with the balancing "judicious" standard. In short, this standard would satisfy the purposes of civil RICO liability while limiting its abusive, overreaching application. Together with Federal Rules 9(b) and 11, this standard would provide the lower courts with the means to curtail the serious problem which civil RICO liability has become for legitimate businesses.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
LYNN M. SMELKINSON *
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae The Chamber of Commerce of the United States of America

* Counsel of Record